90-525

No. _____

Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RON TAYLOR, COMMISSIONER OF THE INSURANCE DEPARTMENT FOR THE STATE OF ARKANSAS ..... *Petitioner*

and

ARKANSAS CREDIT INSURANCE ASSOCIATION (INTERVENOR BELOW) ..... *Petitioner*

vs.

FIRST NATIONAL BANK OF EASTERN ARKANSAS, A NATIONAL BANKING ASSOCIATION ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BY: ALLAN W. HORNE
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QUESTION PRESENTED FOR REVIEW

WHETHER THE COMPTROLLER OF THE CURRENCY IS EMPOWERED BY THE NATIONAL BANK ACT TO AUTHORIZE NATIONAL BANKS TO UNDERWRITE "DEBT CANCELLATION CONTRACTS" AS THE "EQUIVALENT OF CREDIT LIFE INSURANCE" WITHOUT REGARD TO STATE INSURANCE LAWS AND REGULATIONS, OR WHETHER THE McCARRAN-FERGUSON ACT SUBJECTS SUCH ACTIVITY BY NATIONAL BANKS TO THE REGULATORY AUTHORITY OF THE SEVERAL STATES.

LIST OF PARTIES

The names of all parties appear in the caption hereof, and there are no parent or subsidiary companies to be listed.

TABLE OF CONTENTS

Page

QUESTION FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

REPORTS OF OPINIONS DELIVERED 1

JURISDICTIONAL STATEMENT 2

STATUTES AND REGULATIONS INVOLVED IN CASE 2

STATEMENT OF THE CASE 5

ARGUMENT (Reasons for Allowance of Writ) 8

CONCLUSION 20

APPENDIX A: Opinion of the Court of Appeals for the Eighth Circuit ..... A-1—A-11

APPENDIX B: Opinion of the District Court .... B-1—B-12

APPENDIX C: Order Denying Petition for Rehearing C-1

Page

CASES:

American Society of Travel Agents v. Bank of America, 385 F. Supp. 1084 (N.D. Calif. 1974) 11

Arnold Tours Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972) 11

Attorney Gen. ex rel. Monk v. C. E. Osgood Co., 144 N.E. 371 (Mass. 1924) 15

Investment Company Institute v. Camp, 401 U.S. 617 (1971) 12

M & M Leasing Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377 (9th Cir. 1979) 11

National Retailers Corp. v. Valley Nat'l Bank, 604 F.2d 32 (9th Cir. 1979) 11

Securities and Exchange Commission v. National Securities, Inc., 393 U.S. 453 (1969) 17

State v. Beardsley, 88 Minn. 20, 92 N.W. 472 (1902) 15

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982) 15

Ware v. Paxton, 266 S.W.2d 218 (Tex. App. 1954) 15

Webster Groves Trust Co. v. Saxon, 370 F.2d 381 (8th Cir. 1966) 12

STATUTES:

12 *U.S.C.* §24 (Seventh) 3, 5

12 *U.S.C.* §93(a) 3, 5, 15

15 *U.S.C.* §§1011-1012 ..... 2, 5

28 *U.S.C.* §1331 7

28 *U.S.C.* §1291 7

Page

REGULATIONS:

12 C.F.R. §7.7495 ..... 4, 5

Interpretive Letter No. 99 10

Interpretive Letter No. 277 ..... 10, 17

TREATISES:

12 Appleman, *Insurance Law and Practice* §7003 (1981) 15

1 *Couch on Insurance 2nd* §1:14 (1984) 15

Vance, *Law of Insurance* (3rd ed. 1981) 16

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REPORTS OF OPINIONS

1. *First National Bank of Eastern Arkansas vs. Robert M. Eubanks, III, Commissioner of the Insurance Department for the State of Arkansas*, 740 F. Supp. 1427 (E.D. Ark. 1989).

2. *First National Bank of Eastern Arkansas vs. Ron Taylor, Commissioner of the Insurance Department for the State of Arkansas*, 907 F.2d 775 (8th Cir. 1990) (rehearing denied July 27, 1990).

STATEMENT OF JURISDICTIONAL GROUNDS

Judgment was entered herein by the Court of Appeals on June 25, 1990. Rehearing by the full court was denied on July 27, 1990. The statutory basis of jurisdiction in this Court is 28 *U.S.C.* § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN CASE

A. *McCarran-Ferguson Act:*

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States. 15 *U.S.C.* § 1011.
>
> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. 15 *U.S.C.* § 1012.

(B) *National Bank Act:*

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power —
>
> . . . .
>
> Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. . . . 12 *U.S.C.* § 24 (Seventh).
>
> Except to the extent that authority to issue such rules and regulations has been expressly and exclusively granted to another regulatory agency, the Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office, except that the authority conferred by this section does not apply to section 36 of this title or to securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act.' 12 *U.S.C.* § 93(a).

(C) *Comptroller Regulation:*

> A national bank may provide for losses arising from

cancellation of outstanding loans upon the death of borrowers. The imposition of an additional charge and the establishment of necessary reserves in order to enable the bank to enter into such debt cancellation contracts are a lawful exercise of the powers of a national bank and necessary to the business of banking. 12 C.F.R. § 7.7495.

STATEMENT OF THE CASE

This case presents the question of whether First National Bank of Eastern Arkansas ("the Bank"), as an alternative to the usual credit life insurance, may underwrite "debt cancellation contracts" on loans made to borrowers without the necessity of complying with Arkansas insurance laws and the regulations of the Arkansas Insurance Commissioner ("the Commissioner"). The Bank filed suit seeking a declaratory judgment that a 1964 Interpretive Letter of the Office of the Comptroller of the Currency, later adopted as regulation 12 C.F.R. § 7.7495, permits national banks to issue so-called "debt cancellation contracts" without regard to state insurance regulations.

Following trial of the action, the district court ruled in the Bank's favor, holding that "debt cancellation contracts" are within the "incidental powers" of national banks, as that term is defined by the National Bank Act, 12 *U.S.C.* § 24 (Seventh), and are not within the "business of insurance," as that term is defined by the McCarran-Ferguson Act, 15 *U.S.C.* § 1012, so as to invoke the McCarran-Ferguson Act's provisions reserving insurance regulation to the states.

The Bank's suit challenged the authority of the Commissioner to regulate issuance by a national bank of so-called "debt cancellation contracts," on grounds that the Comptroller's regulation, 12 C.F.R. § 7.7495, and the Comptroller's authority over national banks, pursuant to 12 *U.S.C.* § 1 *et seq.* and 12 *U.S.C.* § 93(a), take precedence over the McCarran-Ferguson Act, 15 *U.S.C.* § 1012, which delegates authority over insurance matters to the states. The Arkansas Credit Insurance Association ("the Association"), an organization composed of Arkansas life insurance companies whose business includes the sale and underwriting of credit life insurance, was allowed by the district court to intervene in the action.

In carrying out their business of underwriting credit life insurance, members of the Association typically work with banks, which make the loans credit life insurance is designed to insure. The banks act as selling agent for the credit life insurance companies, informing loan customers of the availability of credit life insurance, taking their applications for credit life insurance, and processing this paperwork and the receipt of premiums. Credit life insurance guarantees cancellation of the borrower's debt in the event of a specified contingency — the borrower's death. "Debt cancellation contracts" would achieve the same result, but would be underwritten and sold by the banks themselves, and not by any independent insurance company.

In the spring of 1987, the Bank began issuing "debt cancellation contracts" on loans of under $10,000, after receiving preliminary consent from the Commissioner. After further review, however, the Commissioner informed the Bank that "debt cancellation contracts" could not be issued without full compliance with Arkansas insurance laws and regulations. The Bank then ceased underwriting the contracts, and filed suit.

The Bank issued approximately 300 "debt cancellation contracts" during a several week period. The Bank declined to ask any questions about the age or health of these 300 applicants, adopting a practice of issuing coverage regardless of the age or health condition of the borrower. The Bank did not establish any reserve account with which to pay claims made on these 300 "debt cancellation contracts," intending instead to pay claims from the Bank's current income or capital. The Bank indicated its intention to eventually establish some form of reserve account. It is undisputed that no employee of the Bank has any previous experience in the administration, reserving, or underwriting of credit life insurance or the handling of claims. The Bank acknowledged that "debt cancellation contracts" achieve the

same result as credit life insurance, and are intended by the Bank as a substitute for credit life insurance. The Bank intended to charge the same rate for "debt cancellation contracts" as insurance companies charge for credit life insurance.

Jurisdiction of the district court was based on 28 *U.S.C.* § 1331. Jurisdiction of the Court of Appeals was based on 28 *U.S.C.* § 1291.

ARGUMENT

At first glance, the "question presented" in this petition for writ of certiorari may appear to be a narrow one, confined to a particular segment of the insurance industry, and the singular action of a state insurance commissioner. However, the impact of the opinion in this case by a three-judge panel of the Eighth Circuit, if it stands, will reverberate far beyond the boundaries of credit life insurance, and the underwriting of such insurance by a small national bank in Arkansas. Because of the legal analysis employed by the Eighth Circuit panel, as well as the legal analysis it did *not* employ, in reaching its decision, this otherwise limited ruling on the power of national banks to flout state insurance regulations in issuing so-called "debt cancellation contracts" may well become a fulcrum for opening the floodgates to unregulated and uninhibited insurance underwriting activities by national banks.

The reason for this elevated importance lies in the nature of the legal clash this case presents, i.e., a direct conflict between two federal statutes, the National Bank Act and the McCarran-Ferguson Act, which, at least until now, had been thought to reserve regulation of insurance matters exclusively to the states. The Eighth Circuit panel's decision casts doubt on the continued viability of McCarran-Ferguson, as it has long been interpreted and applied by the courts, and would appear to give carte blanche to the Comptroller, who would be invested by the panel's decision with sweeping new powers over the "business of insurance," at least whenever it is sought to be conducted by a national bank.

According to the Eighth Circuit panel, the Comptroller, and not the Insurance Commissioner of the State of Arkansas, has complete and exclusive regulatory discretion regarding credit life

insurance underwriting by national banks because such activity is "incidental" to the business of banking, and therefore, *cannot* be within the ambit of the McCarran-Ferguson Act, which, says the panel, was obviously not meant to apply to the activities of national banks.

Such legal "reasoning" does little more than state a conclusion, and one which is both circular and evasive of the fundamental issue: if a given activity constitutes the "business of insurance" within the meaning of the McCarran-Ferguson Act, can the Comptroller of the Currency usurp state regulatory authority over that activity, despite the mandate of the McCarran-Ferguson Act, merely by claiming that such activity is within the "incidental powers" of national banks? In the present case, petitioners will show, as outlined below, that the Eighth Circuit panel's decision failed to adequately address either the "incidental powers" question or the "business of insurance" issue, and, in conducting only a superficial inquiry, may have dramatically revised both the existing law of insurance regulation and that of permissible activities for national banks under the National Bank Act.

The extraordinary writ of certiorari is called for in these circumstances because the panel's decision in the Eighth Circuit would both re-write the McCarran-Ferguson Act, and expand the National Bank Act powers of the Comptroller and of national banks, thus deciding important questions regarding the boundaries between two federal statutes, which have not previously been addressed by this honorable Court. Moreover, the panel's decision of these important questions has been accomplished by way of legal analysis which conflicts with prior decisions of this honorable Court.

I.

ERROR REGARDING THE "INCIDENTAL POWERS" QUESTION

Despite recitation by petitioners of a list of applicable factors, which the federal courts have found it necessary to review in deciding the "incidental powers" question, the Eighth Circuit panel, like the trial court in the first instance, ignored or failed to adequately scrutinize the significant legal issue of whether Respondent's proposed insurance underwriting activities in this case meet the test for "incidental powers" as defined and restricted by the National Bank Act. In lieu of the detailed and careful analysis called for in any case where national banks claim powers not expressly enumerated in the National Bank Act, the panel's decision defers uncritically to the Comptroller's own self-serving pronouncements on the subject. The error (and the danger) of such virtual abdication by a court in favor of the personal opinions of agency regulators (who often change with administrations), is amply demonstrated by examining the Comptroller's own opinion regarding credit life insurance underwriting by national banks, which has ranged from disapproval of such activity as recently as 1979 (*see* Interpretive Letter No. 99, June 8, 1979, 1978-79 CCH Federal Banking Law Reporter, Par. 85, 174), to an abrupt reversal and approval in 1983. *See* Interpretive Letter No. 277, December 21, 1983, 1983-84 CCH Federal Banking Law Reporter, Par. 85, 441.

In thus deferring to the radically various positions of the Comptroller on this subject, the Eighth Circuit panel committed yet another error by failing to consider the nice but nevertheless vitally significant distinction which the petitioners sought to draw between national banks acting as credit life insurance *agents*, and national banks acting as credit life insurance

underwriters. The former activity, all parties concede, *is* a properly-exercised "incidental power" of national banks, but the latter activity, however much it may relate to sales efforts, is a fundamentally distinct transaction, which would take national banks far afield of their traditional roles, and away from the express powers granted them to make loans. Insurance underwriting by national banks would require the banks to take on significant financial risks not associated with mere agency or sales activities.

The federal courts, when called upon to consider whether a new activity is within the "incidental powers" of national banks, have looked closely at such factors as whether the activity involves a traditional function of the banks (such as serving as credit life insurance *sales agent*) versus a new and unfamiliar venture (such as becoming the credit life insurer *underwriter*); the courts have considered whether the new activity sought to be conducted is one which is already subject to regulation by non-banking agencies; whether the new activity would expose national banks to risks of operation which Congress did not intend the banks to assume; whether the Comptroller has been consistent and logical in his positions with regard to the "incidental" nature of the proposed activity; and finally, whether national banks have previously sought to avail themselves of an activity supposedly "convenient and useful" to the "business of banking." *See e.g., Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972); *M & M Leasing Corp. v. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1977) *cert. denied*, 436 U.S. 956; *National Retailers Corporation v. Valley National Bank*, 604 F.2d 32 (9th Cir. 1979); *American Society of Travel Agents, Inc. v. Bank of America National Trust & Savings Ass'n.*, 385 F. Supp. 1084 (N.D. Calif. 1974).

The Eighth Circuit panel's inordinate degree of deference to

the Comptroller's vascillating opinions regarding what particular insurance activities of national banks fall within their legitimate "incidental powers," led the panel into an error of omission which bodes ill for future inquiries into the "incidental powers" question. The panel not only failed to examine and rule upon any of the applicable factors defining "incidental powers," but it also established a dangerous precedent of turning judicial deference to regulatory agencies into outright judicial abdication. Under the panel's method for determining "incidental powers," national banks could conduct virtually *any* insurance activity, and, indeed, any business, so long as the Comptroller approves, and the activity has any remote connection to the banks' extension of loans. This is not the standard by which the Comptroller's prerogatives should be judged, since he, like all other public officials, is governed by the law, not governor of it. *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971); *Webster Groves Trust Company v. Saxon*, 370 F.2d 381, 387 (8th Cir. 1966). Whereas this honorable Court has sanctioned a measured degree of deference to the statutory interpretations of the Comptroller, such deference is not to be applied in a vacuum, but requires a concomitant inquiry into whether the Comptroller's authority (a) is exercised according to law and (b) is based upon a *reasonable* construction of applicable statutes. *Camp, supra*, 401 U.S. 617, 626-27. By declining to engage in a careful, detailed analysis of the background facts, including the critical distinction between *sales* and *underwriting* of credit life insurance, and the Comptroller's own erratic history with regard to credit life insurance underwriting by national banks, the Eighth Circuit panel overlooks to consider either of these prerequisites to the judicial deference it extends.

II.

REVISION OF McCARRAN-FERGUSON AND NEW AUTHORITY FOR COMPTROLLER

While the panel's treatment of the "incidental powers" question involved errors of omission, its laconic resolution of McCarran-Ferguson issues, by contrast, was a study in judicial activism. Viewed against the backdrop of McCarran-Ferguson Act jurisprudence, the panel's decision is truly astounding. Insofar as the petitioners are aware, the panel's decision represents the first time any federal court has found, McCarran-Ferguson notwithstanding, that an admitted insurance product may *not* be regulated at all by the states, but comes within the exclusive regulatory prerogatives of the Comptroller of the Currency. As such, the panel's decision is undeniably revolutionary, having no basis in prior decisions, nor any foundation in statutory language.

That this sweeping characterization of the panel's ruling is not mere advocate's hyperbole may be shown quite clearly by examining the rationale the panel employed — when the reasons for the panel's holdings are stated it becomes all too evident that applicable precedent was ignored, and in its place an entirely new standard was created for marking the boundaries of state regulation of insurance matters under the McCarran-Ferguson Act. If the panel correctly divined a bold new trend, which this honorable Court now is prepared to follow in applying the mandate of McCarran-Ferguson, then, of course, petitioners may not legitimately complain that the panel has substituted its own views for the language of the statute, and the existing case law. But if the radical new course on which the Eighth Circuit panel has embarked in the area of McCarran-Ferguson insurance regulation does not move this honorable

Court to change its own perspectives, then significant errors have occurred, which should swiftly be put to rest.

The panel declared that "because the debt cancellation contracts offered by [Respondent] fall within the incidental powers granted by the National Bank Act, they do not constitute the 'business of insurance' under the McCarran-Ferguson Act." *See* Appendix A, Page A-7. This statement is amazing in its own right because it presupposes that virtually *any* activity deemed "incidental" to the express powers granted to national banks under the National Bank Act will automatically *not* fall within the "business of insurance" under the McCarran-Ferguson Act, an idea at once novel and facially illogical, at least in the absence of any demonstrable basis for asserting some such interactive relationship between the two distinct federal statutes. But the rationale behind the panel's statement is even more astounding. According to the panel, "[t]he primary reason [for its holding that debt cancellation contracts do not constitute the 'business of insurance' under the McCarran-Ferguson Act] is that the McCarran-Ferguson Act was not directed at the activities of national banks." *See*, Appendix A, Page A-7.

This standard for judging the reach of McCarran-Ferguson completely guts the statute of any practical effect because it ignores the express language of McCarran-Ferguson, in which regulation of the "business of insurance" is reserved exclusively to the states, without any stated exemption for insurance business conducted by national banks. By simply saying, in effect, that the Respondent's credit life insurance underwriting in this case is not the "business of insurance" because it is conducted by a national bank, the Eighth Circuit panel has committed two egregious legal errors: (1) the panel's approach to the issue concedes to the Comptroller of the Currency full power of interpretation over the McCarran-Ferguson Act because under

the panel's decision, if the Comptroller first determines that an activity is within a national bank's "incidental powers," then there is no need, indeed, no possibility, of going on to consider whether this activity is within the "business of insurance," and thus, subject to regulation by the states; and (2) the panel's approach discards the three-part test for the "business of insurance" under McCarran-Ferguson, which this honorable Court has elucidated as a means to resolve the very sort of regulatory conflict this case presents.

The Eighth Circuit panel does not contend that the National Bank Act in its original form, or subsequent amendments, carved out any exception to the McCarran-Ferguson Act's broad reservation to the states of regulatory prerogatives over the "business of insurance." Nor does the panel attempt to deal with the express statutory limitation upon the prerogatives of the Comptroller to those areas *not* "expressly and exclusively granted to another regulatory agency. . . ." 12 *U.S.C.* §93(a). The panel merely sidesteps the applicable legal analysis altogether, declining even to discuss how the three-part test for the business of insurance, which this honorable Court outlined in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), might affect the central question of whether the Arkansas Insurance Commissioner or the Comptroller should regulate Respondent's credit life insurance underwriting activities.

The panel rejects state appellate decisions and the judgment of legal scholars, which have unanimously found that so-called "debt cancellation contracts" constitute contracts of insurance, whatever their nomenclature. *See e.g., Ware v. Paxton*, 266 S.W.2d 218 (Tex. Ct. App. 1954); *Attorney Gen. ex rel. Monk v. C. E. Osgood Co.*, 144 N.E. 371 (Mass. 1924); *State v. Beardsley*, 88 Minn. 20, 92 N.W. 472 (1902); 1 *Couch on Insurance 2d* § 1:14 (1984); 12 Appleman, *Insurance Law and*

Practice, § 7003 (1981); Vance, *Law of Insurance* (3rd ed. 1951), p. 84. However, while stating that federal law, not state decisions, controls the question of what is the " 'business of insurance' " as that term is used in the McCarran-Ferguson Act," Appendix A, Page A-10, n. 8, the panel flatly declines to apply controlling federal law to the facts before it. Instead of employing the recognized three-part McCarran-Ferguson Act test for the "business of insurance," the panel offers its own new test based upon its view that "debt cancellation contracts issued by banks in connection with loans differ significantly from traditional insurance contracts." *See* Appendix A, Page A-10.

The trouble with the Eighth Circuit panel's new test for the "business of insurance" is first, that it is colored inexorably by the panel's announced preconception that any activity declared by the Comptroller to be within a bank's "incidental powers" *cannot* be within the "business of insurance" as that term is used in the McCarran-Ferguson Act. But, secondly, the panel's new test contains its own internal error, when compared with the previous rulings of this honorable Court concerning what constitutes the "business of insurance."

Citing its own opinion that Respondent's "debt cancellation contracts" "do not require the bank to take an investment risk or to make payment to the borrower's estate," Appendix A, page A-10, the panel concludes that this "distinction" between "debt cancellation contracts" and so-called "traditional insurance contracts" justifies its finding that Respondent's credit life insurance underwriting by means of "debt cancellation contracts" does not fall within the "business of insurance." The error in this analysis lies in its focus upon the ***investment risk to the bank, i.e., the insurance company,*** rather than upon the nature of the contract in issue and how it affects the relationship between the insurer and the insured. This honorable Court has expressly

indicated that, when judging whether a given activity falls within the "business of insurance" as that term is used in McCarran-Ferguson, it is *not* appropriate to focus upon the impact of such activity on a given company because, under McCarran-Ferguson, the "business of insurance" does *not* equate with the business of insurance *companies*. *See e.g., Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453, 460 (1969).

It should be pointed out that despite this legally-misdirected attempt to point out a "significant" difference between so-called "debt cancellation contracts" and what the panel viewed as more "traditional insurance contracts," the panel's opinion makes no attempt to argue that "debt cancellation contracts" are not, in fact, contracts of insurance. Instead, the panel's decision purports to avoid McCarran-Ferguson's applicability to an insurance product by noting that McCarran-Ferguson applies to the "*business* of insurance," a determination controlled not by state but rather by federal precedent. *See* Appendix A, Page A-10, n. 8. The panel then proceeds to adopt an entirely new approach to application of that federal precedent by focusing not upon the relationship between a "debt cancellation contract" and the "policyholder," but rather, upon the relationship between the national bank (i.e., insurer) and the solvency risks involved.

This particular approach to the question of whether McCarran-Ferguson prevents the intrusion of the Comptroller into insurance regulation was perhaps the only analytical avenue open to the panel in light of the unanimous opinion of the courts that "debt cancellation contracts" are insurance contracts, and the frank concession of the Comptroller that, in fact, "debt cancellation contracts" are, in the Comptroller's own words, "the equivalent of underwriting credit life insurance." *See* Interpretive Letter No. 277, December 21, 1983, 1983-84 CCH Federal Banking Law Reporter, Par. 85,441. However, the result

of such analysis would be a profound shift in the law of insurance regulation and the opening of a floodgate through which national banks intent on entering into the insurance business may routinely rush, employing the semantic guise of this remarkable new tool, the so-called "debt cancellation contract". This same rationale could be used to permit national banks to engage in automobile and property and casualty insurance underwriting via "debt cancellation contracts," which would be activated upon the occurrence of a specified contingency such as auto collision, fire or theft.

In other words, the panel's decision clearly holds forth the prospect for a wholesale usurpation of state regulation of insurance, and an invasion of the insurance industry by banks underwriting automobile physical damage insurance through an agreement to cancel the debt if the automobile is destroyed in an accident, or fire insurance in the event of the burning of a mortgaged house. Under the Eighth Circuit panel's analysis, the only barrier to such activity is the Comptroller's prevailing opinion, not the restraints of the National Bank Act itself or the dictates of the McCarran-Ferguson Act.

Petitioners respectfully must contend that the Eighth Circuit panel's decision turns the applicable legal analysis on its head, tramples without logical, legal or analytical foundation upon the unambiguous mandate of Congress as set forth in the McCarran-Ferguson Act, and permits the Comptroller to run roughshod over state insurance regulators virtually at his whim. Compounding this unfortunate result is the fact that, without engaging in critical analysis or scrutiny, the panel has opened the way for national banks to engage at will in a new and risky venture, the underwriting of credit life insurance, as an activity supposedly "incidental" to the express powers granted to national banks. This honorable Court should issue the extra-

ordinary Writ of Certiorari in this case in order to ensure that the grievous errors represented in the Eighth Circuit panel's decision do not become the basis for a whole new system of insurance regulation in which, insofar as any proposed insurance activities of national banks is concerned, the McCarran-Ferguson Act is relegated to being merely what the Comptroller of the Currency says it is.

CONCLUSION

For all of the foregoing reasons, a Writ of Certiorari should be issued to the Court of Appeals for the Eighth Circuit, so that this honorable Court may review the Eighth Circuit panel's decision, and conform it to applicable law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Allan W. Horne, hereby certify that I have served copies of the foregoing petition for writ of certiorari in accordance with Supreme Court Rules 29.3 and 29.5(b) by U.S. Mail, with sufficient pre-paid postage to Mr. Phil Hicky, Butler, Hicky & Long, P.O. Box 989, Forrest City, Arkansas 72335, attorneys for respondent, this 20th day of September, 1990.

/s/ Allan W. Horne

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 89-1260

First National Bank of Eastern Arkansas, A National Banking Association,	★	
Appellee,	★	
v.	★	
Ron Taylor,* Commissioner of the Insurance Department for the State of Arkansas	★	Appeal from the United States District Court for the Eastern District of Arkansas.
Appellant,	★	
Arkansas Credit Insurance Association (Intervenor Below), Appellant.	★	

Submitted: January 18, 1990

Filed: June 25, 1990

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

LAY, Chief Judge.

In July, 1987, First National Bank of Eastern Arkansas

*Ron Taylor succeeded Robert M. Eubanks, III, as Commissioner of the Arkansas Insurance Department before the notice of appeal was filed. Thus, he is substituted as an appellant. *See* Fed. R. Civ. P. 25(d)(1).

(FNB) began offering debt cancellation contracts as additional-cost options to customers borrowing $10,000 or less. These contracts obligated FNB to cancel the unpaid loan balance remaining at the borrower's death, regardless of the cause of death. FNB offered the debt cancellation contracts at rates that did not vary with a borrower's age or medical condition. A regulation promulgated by the United States Comptroller of Currency (Comptroller) authorizes national banks to enter into debt cancellation contracts. *See* 12 C.F.R. § 7.7495 (1990).[1]

In September, 1987, the Arkansas Insurance Department notified FNB that debt cancellation contracts were the equivalent of credit life insurance policies, and thus subject to state insurance laws. The Department requested that FNB stop offering the contracts.[2] FNB complied, but then brought a suit in federal district court seeking a declaration that the Department's action was preempted by the National Bank Act, 12 U.S.C. §§ 21-216d (1988). Jurisdiction was invoked pursuant to 28

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[1]12 C.F.R. § 7.7495 provides:

> A national bank may provide for losses arising from cancellation of outstanding loans upon the death of borrowers. The imposition of an additional charge and the establishment of necessary reserves in order to enable the bank to enter into such debt cancellation contracts are a lawful exercise of the powers of a national bank and necessary to the business of banking.

[2]The Department indicated in its letter to FNB that the bank's failure to stop offering debt cancellation contracts would result in enforcement action by the Commissioner. Under Ark. Code of 1987 Ann. § 23-65-105 (Supp. 1989), the Commissioner has authority to issue a cease and desist order against any person who engages in the business of insurance without a license.

U.S.C. §§ 1331 and 2201.[3] The district court[4] held that the National Bank Act protected FNB's power to enter into debt cancellation contracts, and that the contracts did not constitute the "business of insurance" under section 2 of the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1988). The Commissioner of the Arkansas Insurance Department (Commissioner) appeals.[5] We affirm the district court.

I.

Our inquiry in this case is limited to the question whether the Arkansas Insurance Commissioner may prohibit FNB from

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[3]We raised a question about jurisdiction on our own motion after argument. In *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 248 (1952), the Court suggested that federal-question jurisdiction may be lacking when a declaratory complaint sets forth a claim of federal right that is in the nature of a defense to a threatened state court action. Based on that dicta, and the "well-pleaded complaint" rule, this court in *Home Federal Savs. & Loan Ass'n v. Insurance Dep't of Iowa*, 571 F.2d 423 (8th Cir. 1978) and in *Lawrence County v. South Dakota*, 668 F.2d 27 (8th Cir. 1982), rejected federal jurisdiction because the preemption claim was in the nature of a defense to a state action. However, the Supreme Court has since made clear that a party may apply directly to federal court for relief based on an affirmative claim of preemption. *See Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 259 n.6 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). Jurisdiction is not defeated simply because a plaintiff requests declaratory relief rather than an injunction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); 13B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3566, at 99 (1984). Thus, we have jurisdiction to review the merits of this case.

[4]The Honorable George Howard Jr., United States District Judge for the Eastern District of Arkansas.

[5]The Arkansas Credit Insurance Association intervened below, and joins the Commissioner in this appeal.

entering into debt cancellation contracts.[6] The Commissioner initially urges that such a prohibition does not conflict with federal law because the National Bank Act does not grant national banks the power to offer debt cancellation contracts. The Commissioner argues that in authorizing the contracts, the Comptroller has exceeded his authority. We disagree.

In addition to enumerating specific powers, including the lending of money, the National Bank Act grants national banks the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). The Comptroller, through 12 C.F.R. § 7.7495, has interpreted "incidental powers" to include the offering of debt cancellation contracts, and the Supreme Court has made clear that the Comptroller's interpretation of the National Bank Act must be given "great weight":

> "It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by

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[6]Because the Commissioner's request that FNB stop offering debt cancellation contracts was grounded on FNB's failure to obtain a state license, the parties dispute whether this case should be regarded as one of prohibition or regulation. However, Arkansas law requires licensees to submit to extensive state regulation, including maintenance of specific capital and surplus levels, payment of licensing fees, financial information disclosure, and inspection by the Commissioner. Compliance with these requirements would pervert FNB's status as a federal instrumentality. Moreover, 12 U.S.C. § 484 (1988) prohibits states from exercising "visitorial powers" over national banks. For these reasons, we regard the Commissioner's request as a prohibition on FNB's issuance of debt cancellation contracts.

The Comptroller, in an amicus curiae brief, concedes that there may be particular state insurance regulations (e.g., those limiting premium rates) which apply to debt cancellation contracts and which do not conflict with national banking powers. We agree with the Comptroller's argument that these issues are more properly addressed on a case-by-case basis.

> the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws. See *First National Bank v. Missouri*, 263 U.S. 640, 658 [1924]."

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 403-04 (1987) [quoting *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-27 (1971)]. The Comptroller's determination as to what activities are authorized under the National Bank Act should be sustained if reasonable. *See Clarke*, 479 U.S. at 406, 409.

The "incidental powers" of national banks are not limited to activities that are deemed essential to the exercise of express powers. Rather, courts have analyzed the issue by asking whether the activity is closely related to an express power and is useful in carrying out the business of banking. For example, the Supreme Court, in *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41 (1939), held that a national bank was authorized to operate a safe-deposit business, reasoning that this activity was incidental to the bank's express power to accept special deposits. *Id.* at 49-50. *See also Securities Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1049 (2d Cir. 1989) (sale of mortgage "pass-through" certificates authorized by National Bank Act because "convenient and useful" in connection with bank's sale of mortgage loans), *cert. denied*, 110 S. Ct. 1113 (1990); *American Ins. Ass'n v. Clarke*, 865 F.2d 278, 281-82 (D.C. Cir. 1988) (sale of municipal bond insurance by national bank subsidiary falls within incidental powers because it is essentially a credit product); *M & M Leasing v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977) (National Bank Act authorizes personal property leasing that is incidental to national bank's express power to "loan money on personal property"), *cert. denied*, 436 U.S. 956 (1978); *cf. Arnold*

Tours, Inc. v. Camp, 472 F.2d 427, 433-34 (1st Cir. 1972) (operation of full-scale travel agency not within incidental powers because not convenient or useful in connection with any express power).

As the district court found, the debt cancellation contracts at issue in this case are directly related to FNB's expressly-authorized lending power. The contracts are sold only in connection with loans made by FNB, and involve only FNB and its borrowing customers. The contracts provide borrowers with a convenient method of extinguishing debt in case of death, and enable FNB to avoid the time, expense, and risk associated with attempting to collect the balance of the loan from a borrower's estate. Because we agree with the district court that the debt cancellation contracts are directly connected to FNB's lending activities, we deem the Comptroller's authorization of this activity as reasonable and within the incidental powers granted by the National Bank Act.

II.

Having found that the National Bank Act authorizes national banks to offer debt cancellation contracts as "incidental" to the business of banking, we find in favor of FNB under the principle of federal preemption. Because national banks are considered federal instrumentalities, *e.g.*, *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375 (1954), states may neither prohibit nor unduly restrict their activities. *See id.* at 378-79; *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944). Thus, the National Bank Act preempts the Commissioner's authority to prohibit FNB from offering debt cancellation contracts.

The Commissioner argues, however, that section 2 of the McCarran-Ferguson Act limits the preemptive power of the

National Bank Act in this case because it forbids courts to construe the National Bank Act in a manner that impairs a state's authority to regulate the "business of insurance." 15 U.S.C. § 1012(b).[7] The Commissioner urges that because debt cancellation contracts have the same effect as credit life insurance contracts, they are subject to the exclusive regulatory authority of the state under the McCarran-Ferguson Act. We reject this argument. We hold that because the debt cancellation contracts offered by FNB fall within the incidental powers granted by the National Bank Act, they do not constitute the "business of insurance" under the McCarran-Ferguson Act.

We reach this holding for two reasons. The primary reason is that the McCarran-Ferguson Act was not directed at the activities of national banks. The McCarran-Ferguson Act was passed by Congress in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that the insurance industry was subject to regulation by Congress under the Commerce Clause, and that insurance company activities were subject to federal antitrust laws. *Id.* at 553. The McCarran-Ferguson Act was designed to preserve traditional state regulation and taxation of insurance companies, and to provide insurance companies with a partial exemption from federal antitrust laws. *Group Life & Health Ins.*

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[7] The relevant portion of section 2 of the McCarran-Ferguson Act reads as follows:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance • • • .

15 U.S.C. § 1012.

Co. v. Royal Drug Co., 440 U.S. 205, 217-18 (1979); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). In holding that certain pharmacy contracts involving health-care organizations were not the "business of insurance," the Court in *Group Life* expressed doubt as to whether the McCarran-Ferguson Act applied to entities commonly thought to be outside the insurance industry:

> There is not the slightest suggestion in the legislative history that Congress in any way contemplated that arrangements such as the Pharmacy Agreements in this case, which involve the mass purchase of goods and services from entities outside the insurance industry, are the "business of insurance."
>
> • • •
>
> At the time of the enactment of the McCarran-Ferguson Act, corporations organized for the purpose of providing their members with medical services and hospitalization were not considered to be engaged in the insurance business at all, and thus were not subject to state insurance laws. • • • Since the legislative history makes clear that Congress certainly did not intend the definition of the "business of insurance" to be *broader* than its commonly understood meaning, the contemporary perception that health-care organizations were not engaged in providing insurance is highly significant in ascertaining congressional intent.

440 U.S. at 224-27 (emphasis in original). *See also Union Labor Life*, 458 U.S. at 133 ("§ 2(b) [of the McCarran-Ferguson Act] was intended primarily to protect '*intra*-industry cooperation' in the underwriting of risks") (quoting *Group Life*, 440 U.S. at 221) (emphasis in original); *United Servs. Auto. Ass'n v. Muir*, 792

F.2d 356, 364 (3d Cir. 1986) (Pennsylvania statute prohibiting mergers between banks and insurance companies not protected by McCarran-Ferguson Act because, among other reasons, banks are not entities within the insurance industry), *cert. denied*, 479 U.S. 1031 (1987).

The McCarran-Ferguson Act was not intended to give states power to regulate beyond that which they had been thought to possess prior to the *South-Eastern Underwriters* decision. As the Court in *SEC v. National Sec., Inc.*, 393 U.S. 453 (1969) said,

> The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. As the House Report makes clear, "[i]t [was] not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case." H.R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945).

Id. at 459. *See also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 n.8 (1985). Yet, well before the *South-Eastern Underwriters* decision, regulation of national banks was within the exclusive domain of the federal government. *E.g., First Nat'l Bank v. California*, 262 U.S. 366, 369 (1923). This strongly indicates that Congress did not intend the "business of insurance" to encompass lawful activities of national banks.

Our second reason for holding that the debt cancellation contracts offered by FNB are not the "business of insurance" is

that debt cancellation contracts issued by banks in connection with loans differ significantly from traditional insurance contracts. Although debt cancellation contracts may, as the Commissioner argues, transfer some risk from the borrower to the bank,[8] the contracts do not require the bank to take an investment risk or to make payment to the borrower's estate. The debt is simply extinguished when the borrower dies. Thus, the primary and traditional concern behind state insurance regulation — the prevention of insolvency — is not of concern to a borrower who opts for a debt cancellation contract. As Justice Brennan said in his concurring opinion in *Variable Annuity Life*, 359 U.S. at 90-91, "The prevention of insolvency and the maintenance of 'sound' financial condition in terms of fixed-dollar obligations is precisely what traditional state regulation [of insurance] is aimed at." The fact that debt cancellation contracts issued by national banks in connection with loans do not implicate this central concern of insurance regulation, at least as it relates to the ability of the banks to fulfill their obligations under the contracts, adds further support to our

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[8]We acknowledge that in addition to the Commissioner a few state appellate courts have found debt cancellation contracts to fall within their states' definitions of "insurance." *See Ware v. Heath*, 237 S.W.2d 362 (Tex. Civ. App. 1951); *Attorney Gen. ex rel. Monk v. C. E. Osgood Co.*, 144 N.E. 371 (Mass. 1924); *State v. Beardsley*, 88 Minn. 20, 92 N.W. 472 (1902); *see also United Sec. Life & Trust Co. v. Bond*, 16 App. D.C. 579 (1902). However, state law defining insurance is not controlling on the issue of whether an activity falls within the "business of insurance" as that term is used in the McCarran-Ferguson Act. *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959).

holding that debt cancellation contracts should not be considered the "business of insurance."[9]

III.

In conclusion, we hold that the National Bank Act precludes the Arkansas Commissioner of Insurance from prohibiting FNB, either by direct coercion or through a license requirement, from entering into debt cancellation contracts with its borrowers. The Comptroller has reasonably determined that these contracts are authorized by the National Bank Act, and we think that this determination must control. Therefore, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[9]The responsibility of ensuring the financial condition of the national banking system has long been committed to the Comptroller. In the case of debt cancellation contracts, the Comptroller has indicated that banks must use prudent banking judgment, which may include the establishment of reserves to cover losses resulting from early debt cancellation. *See* 12 C.F.R. § 7.7495; Letter from J. Michael Shepherd, Senior Deputy Comptroller for Corporate and Economic Programs, to W. D. Glover, FNB Chairman and President, (Jan. 7, 1988) (Trial Ex. 8). If a national bank is engaging in "unsafe or unsound" banking practices, the Comptroller, under 12 U.S.C. § 1818(b), may issue a cease and desist order.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

First National Bank of Eastern
Arkansas, A National Banking Association ..... *Plaintiff*

v. No. LR-C-87-629

Robert M. Eubanks, III, Commissioner
of the Insurance Department for the
State of Arkansas ..... *Defendant*

Arkansas Credit Insurance Association ..... *Intervenor*

FILED: January 24, 1989

MEMORANDUM OPINION AND ORDER

This action was instituted by First National Bank of Eastern Arkansas, a National Banking Association, (First National) against Robert M. Eubanks, III, Commissioner for the Insurance Department of the State of Arkansas (Commissioner Eubanks)[1] seeking a declaratory judgment. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §§ 1331 and 2201. The central issue for resolution is whether First National's debt cancellation agreements with borrowers, whereby any unpaid indebtedness is assumed by First National or cancelled at the borrowers' death, by resorting to a cash reserve, constitute the sale of insurance making the transaction subject to regulation by Arkansas's Insurance Department.

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[1]Arkansas Credit Insurance Association, an Arkansas not-for-profit association composed of Arkansas Life Insurance Companies whose business includes the underwriting and sale of credit life and disability insurance, was granted leave to intervene in this proceeding. Commissioner Eubanks and the association will be referred to as defendants.

Subsidiary issues to be resolved are:

1. Whether debt cancellation contracts are incidental to traditional banking activities; and,

2. Whether debt cancellation contracts are in conflict with the McCarran-Ferguson Act, 15 U.S.C. § 1101 *et seq.*

RELEVANT FACTS

On March 1, 1964, the United States Comptroller of the Currency issued the following regulation which appears in 12 C.F.R. 7.7495:

> Debt Cancellation Contract. A national bank may provide for losses arising from cancellation of outstanding loans upon the death of borrowers. The imposition of an additional charge and the establishment of necessary reserves in order to enable the bank to enter into such debt cancellation contracts *are a lawful exercise of the powers of a national bank and necessary to the business of banking.* (Emphasis added)

In 1987, preparatory to entering into debt cancellation agreements with some of its customers, in lieu of the usual practice of credit life insurance coverage, First National formulated a plan and prepared documents for the contemplated debt cancellation venture[2] and advised the Insurance Depart-

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[2]First National's procedure extends to the customer the option to select credit life insurance or the debt cancellation agreement. The fee for the agreement is essentially the same as that for credit life. Under the procedure, 30% of the fee will be placed in a reserve to handle the debt cancellation. Under the credit life procedure the Bank, as agent of the insurance carrier, receives 40% of the fee received from the borrower as its commission while the remaining 60% goes to the carrier as its commission and establishing a reserve account.

ment of the State of Arkansas, by letter, of its plans. On April 21, 1987, David V. Simmons, Assistant Commissioner and Chief Counsel for the Arkansas Insurance Department, advised First National by letter:

> An agreement between the obligee and the obligor calling for the cancellation of obligations in the event of death, conditioned upon the payment of a fee, would not be 'insurance' . . . and would not be regulated by this Department. If the debt were to be 'guaranteed' by any third party rather than cancelled, or if the bank was agreeing to extinguish an obligation no longer held by that bank, the agreement would be 'insurance' and, therefore, would be improper. Privity of contract is absolutely essential to the determination.
>
> It also should be noted that the lender must not represent or imply in any manner that the Debt Cancellation Contract is insurance. Confusion and misrepresentation will expose the lending institution to sanctions by this Department.

After receipt of Commissioner Simmons' letter, First National began entering into debt cancellation agreements with some of its customers.[3] On July 27, 1987, First National received the following letter from Commissioner Simmons:

> Dear Mr. Glover:
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> The Insurance Commissioner has been asked to review the opinion expressed to you on the above subject [debt cancellation contracts] in my letter of April 21, 1987. Since

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[3]The Board of Directors of First National on July 15, 1987, passed a resolution providing that debt cancellation agreements would be made available to borrowers on loans of $10,000 or less.

this matter is being reviewed, we felt that you should be advised in that we could be planning to take some action based upon the April 21, 1987, letter. If, in fact, you have already commenced to issue debt cancellation contracts, we would as a matter of information appreciate being copied with copies of your debt cancellation contracts and any mathematical formulas utilized to establish the reserves on those contracts.

I would appreciate hearing from you as soon as possible, and the Department will communicate directly with you in the event that the opinion expressed in my previous letter is revised.

On September 1, 1987, Commissioner Simmons advised Mr. Glover:

This letter is to inform you that the position of the insurance department on the above subject [debt cancellation contracts], as previously announced in my letter of April 21, 1987, has been reversed upon further research and review. Ark. Stat. Ann. § 66-202 defines insurance as:

> ". . . a contract whereby one undertakes to indemnify another or pay a specified amount or provide a designated benefit upon terminable contingencies."

A review of the applicable treatises, cases from other jurisdictions, resolutions of the National Association of Insurance Commissioners dating back to 1964, and guidelines set by the Arkansas Supreme Court in the case of *West & Company v. Sykes*, 257 Ark. 245, 515 S.W.2d 635 (1974), lead to conclusion that the previous opinion must be reversed. In the *West* case, the Arkansas Court determined that decisions on this issue must be made on a case-by-case

basis in accordance with the evils to be regulated and the facts of each case. It is apparent that the lending institution intends the issuance of debt cancellation contracts to be a profit-generator. You have told us that you will charge the same as credit life insurors and will attempt to make the program actuarially sound by the utilization of a reserve liability established to cover the losses. It is evident that you view the debt cancellation contract as an identical alternative to credit life insurance. The Legislature of Arkansas has determined that credit life insurance is fraught with sufficient 'evil' as to make it worthy of its own chapter of the Insurance Code, separate from other forms of life insurance. The history of abuses in the credit life industry nationwide indicates that the Legislature accurately viewed the need for regulation of this product. As you aptly point out in your letter of July 28, 1987, the amount you can charge for this product, if not regulated by this Department, is unlimited.

Since you have previously instituted the debt cancellation program, at least in part relying on the April 21, 1987, letter, you may continue this coverage until the individual contracts' natural expiration date. No new debt cancellation contract may be issued beyond the date of this letter, however. Failure to honor this request will result in action being brought pursuant to Ark. Stat. Ann. § 66-2901, *et seq.*, Unauthorized Insurer.

Although First National asserted that national banks' activities and business ventures are controlled and regulated by the National Bank Act, 12 U.S.C. § 1, *et seq.*, the rules, regulations and interpretative rulings of the United States Comptroller of Currency; and that the laws, rules and regulations of the State of Arkansas have no binding effects, First National

ceased entering into debt cancellation agreements with borrowers pending a ruling by this Court on First National's request for a declaratory judgment.

Defendants argue, essentially, that First National's debt cancellation contract plan is, in reality, credit life insurance and, as such, constitutes the business of insurance and, thus, subject to the regulatory authority of the Arkansas Insurance Department pursuant to The McCarran-Ferguson Act, Title 15 U.S.C. § 1012.

DISCUSSION

I.

THE BUSINESS OF BANKING

The National Bank Act, 12 U.S.C. § 24 (Seventh) provides:

> ". . . [A] national banking association . . . shall have power:
>
> Seventh. . . . all such incidental powers as shall be necessary to carry on the business of banking. . . .

The United States Comptroller's Regulation of March 1, 1964, referred to above and found in 12 C.F.R. 7.7495 was issued pursuant to the comptroller's interpretation of Section 24 (Seventh). The comptroller of the currency, who is empowered by the Congress of the United States to regulate the banking industry, in issuing the regulation in question not only concluded that "debt cancellation contracts are a lawful exercise of the powers of a national bank and necessary to the business of banking", but obviously concluded the agreements are safe and constitute sound banking practices.[4]

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[4]The Arkansas Supreme Court in *First National Bank of Leslie v. Stokes*, 134 Ark. 368, 203 S.W. 1026 (1918) recognized that national banks may exercise those powers "expressly granted, or which are incidental to carrying on the business for which they are established."

In this Court's opinion, and accordingly so finds, the debt cancellation agreements proposed by First National are material and a vital asset to a bank's activity of loaning money on personal security. The general consensus appears to be that national banks possess those incidental powers that are necessary and essential to fulfilling and engaging effectively in traditional banking activities; and that national banks may not be subject to state laws and regulations which tend to impair the efficiency of these banks. *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972); *Independent Bankers Association of America v. Heimann*, 613 F.2d 1164 (D.C. 1979).

The Arkansas Insurance Commissioner's major concern appears to be the fact that First National's debt cancellation agreements are similar to credit life insurance coverage; and that the State of Arkansas has concluded that "credit life insurance is fraught with sufficient 'evil' to make it worthy . . . of regulation. . . ." In essence, Arkansas' Insurance Department views First National's debt cancellation agreements essentially credit life insurance. A comparison of First National's agreement with credit life insurance discloses, however, that while there is some similarity between the two procedures, there is, in fact, a material difference between the two. For example:

1. Both credit life insurance and the debt cancellation agreements accomplish the same objective — the satisfaction of a debtor's obligation to the bank upon the debtor's death.

2. Under credit life insurance, a bank acts as agent for the credit life insurance company and receives a commission from the insurance company for this service. The third party to the relationship is the insured-borrower.

3. Under the debt cancellation agreements, the principals involved are only the bank and the debtor. The elimination of the

third party, as required under the credit life coverage, would, indeed, seemingly benefit the borrower to the extent of reducing premiums paid for the coverage. In addition, there is essentially no risk assumed by the borrower given the fact that the bank has a duty to cancel the indebtedness upon receiving proof of death of the debtor irrespective of the bank's financial standing at the time; age of the debtor is not a material factor in determining whether a debtor may take advantage of the option to obtain debtor cancellation agreement coverage; nor is there a requirement that the borrower submit to a medical examination.

4. Significantly, there are no exclusions in the debt cancelling arrangement, as in credit life insurance coverage, which could, if applicable, excuse an insurance company from honoring a claim.

This Court is persuaded that the debt cancellation agreements are designed to protect loans, traditionally a banking activity, and, as such, the activity is an incidental power referred to in the incidental powers clause of the National Bank Act. In other words, the debt cancellation agreements are directly related to what the National Bank Act refers to as "the business of banking."

This Court is not persuaded that the alleged 'evils' — inability of credit life insurance carrier, in case of insolvency, to honor or pay a financial institution upon the death of an insured-borrower, and the likelihood of a claimant, under a credit life policy, facing defensive tactics in the form of exclusions — are present under First National's debt cancellation agreements given the fact that the bank has a duty to cancel the debt upon notice of death of the borrower. Really, there are no defensive factors available to First National in the form of exclusions. Moreover, under the comptroller's regulation, First National is

authorized to create "necessary reserves" as forms of self-protection. In addition, the comptroller of currency has the direct responsibility to monitor and regulate the activities of national banks in order to make sure that a national bank's operations are sound in all respects. In other words, the comptroller of currency is in a position to prevent any unsafe and unsound banking practices that might develop in connection with the debt cancellation agreements. It is plain that the proposed debtor cancellation agreement will be intertwined with the day-to-day functions of First National which are subject to scrutiny by federal regulators.

Finally, it appears that 12 U.S.C. § 1972, which precludes tying arrangements on the part of national banks, serves as an additional protective device against any abuse or misuse of debtor cancellation agreements. Section 1972 provides:

"A bank shall not in any manner extend credit . . . on condition or requirement —

(A) that the customer shall obtain some additional . . . service from such banks. . . ."

In essence, this Court is not persuaded that Arkansas' concern about the likelihood of abuse and unethical practices, will develop, if First National's debtor cancellation agreements are instituted, is well founded.

II.

THE McCARRAN-FERGUSON ACT

The McCarran-Ferguson Act, 15 U.S.C.A. § 1012 provides:

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

It has been generally considered that the basic objective of the McCarran-Ferguson Act is to authorize state regulation of the activities of insurance companies. See: *Securities and Exchange Commission v. National Securities, Inc., et al,* 393 U.S. 453 (1969); 15 U.S.C. § 1011 *et seq.* Stated differently, "[t]he McCarran-Ferguson Act exempts from federal law only those state regulations that specifically regulate the 'business of insurance'. . . ." See: *Bernstern v. Centaur Ins. Co.,* 606 F. Supp. at 106 (N.D. Ill., E.D., 1984). What conduct of an entity constitutes the "business of insurance" is a federal question. *Fry v. John Hancock Mutual Life Insurance Company,* 355 F. Supp. 1151 (D.C. Tex., 1973).

The prevailing view appears to stress that only "core activities" of a traditional insurance company — the underwriting and risk spreading functions come within the meaning of the term "business of insurance." See *Group Life and Health Insurance Company v. Royal Drug Company,* 440 U.S. 205 (1979).

In *Hahn v. Oregon Physicians Service,* 689 F.2d 840 (9th Cir. 1982), the court observed:

> The insurance contract involves a contractual relationship which exists when an insurer, for consideration, agrees to reimburse an insured for loss caused by designated contingencies. *See* Black's Law Dictionary 721 (5th Ed. 1979). This underwriting and subsequent spreading of the policyholder's risk is the primary element of the insurance contract and is, therefore, the 'business of insurance'."

This Court is not persuaded that First National's debt cancellation

agreements, which are not directly related to the "business of insurance," but are "incidental powers as shall be necessary to carry on the business of banking," fall within the ambit of the McCarran-Ferguson Act. See: *Independent Bankers Association of America v. Heimann,* 613 F.2d 1164, 1170 (D.C. Cir. 1979) *cert. denied* 449 U.S. 823 (1980).

In *Heimann,* the court in responding to a challenge to the comptroller's regulation relating to credit life insurance as being in conflict with the McCarran-Ferguson Act, stated:

> Unlike other forms of insurance coverage, however, credit life insurance is a limited special type of coverage written to protect loans. In no way does it involve the operations of a general life insurance business. . . . Moreover, Congress has specifically granted national banks all incidental powers necessary to carry on the business of banking, 12 U.S.C. § 24 (1976). . . .

The Court in *Heimann* concluded that the assertion that the McCarran-Ferguson Act "must be interpreted as prohibiting the credit life regulation" does not "fall within the structures of the statute." 613 F.2d at page 1170.

First National's debt cancellation agreements, as credit life insurance, "are a limited special type of coverage written to protect loans" which are incidental to those traditional powers necessary for national banks to carry on the business of banking efficiently on the one hand, and serve as a cost reduction for services offered by First National to borrowers on the other hand. In essence, First National is endeavoring to extend to its customers a service in connection with its loan operations. In the opinion of this Court, this finding is practically pivotal and dispositive in distinguishing the debt cancellation agreements as incidental to the "business of banking" from the assertion of defendants that such agreements constitute the "business of insurance."

Finally, defendants have cited the case of *Arnold Tours, Inc. v.*

Camp, 472 F.2d 427 (1st Cir. 1972) in support of their argument that First National's debt cancellation agreements are not within the concept of "business of banking". The Court deems it sufficient to state that *Arnold Tours, Inc. v. Camp, supra*, is simply not in point and defendants' reliance thereon is misplaced. *Arnold Tours, Inc., supra*, did not involve either debt cancellation agreements or credit life insurance, but related to a national bank's operation of a full scale travel agency which was found not to be an exercise of incidental powers referred to in the incidental powers clause of the National Bank Act, 12 U.S.C.A. § 24, subd. 7.

III.

BY WAY OF SUMMARY

1. First National's debt cancellation agreements are a limited special type of coverage written to protect loans and fall within those incidental powers necessary to carry on the business of banking as secured to national banks under 12 U.S.C. § 24, (Seventh) (1976).

2. First National's debt cancellation agreements do not constitute the "business of insurance" since it is plain that the procedure employed and the purpose for same are unrelated to the "business of insurance" and, as such, are not precluded by the McCarran-Ferguson Act.

3. To permit the Arkansas Insurance Commission to regulate First National's debt cancellation agreements would impede and frustrate First National's ability to engage effectively in the "business of banking." In essence, First National should be authorized to employ the debtor cancellation agreements with its customers as permitted by the United States Comptroller of the currency under and pursuant to Regulation 12 C.F.R. 7.7495.

IT IS SO ORDERED this 24th day of January, 1989.

/s/ George Howard, Jr.
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 89-1260EA

First National Bank of Eastern Arkansas,	★	
Appellee,	★	
v.	★	
Ron Taylor, Commissioner of the Insurance Department for the State of Arkansas, et al.,	★	Order Denying Petition for Rehearing and Suggestion for Rehearing En banc
Appellants,	★	

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

July 27, 1990

(2)

No. 90-525

Supreme Court, U.S.
FILED
OCT 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RON TAYLOR, COMMISSIONER OF
THE INSURANCE DEPARTMENT FOR THE
STATE OF ARKANSAS ..... *Petitioner*

AND

ARKANSAS CREDIT INSURANCE
ASSOCIATION (INTERVENOR BELOW) ..... *Petitioner*

VS.

FIRST NATIONAL BANK OF EASTERN
ARKANSAS, A NATIONAL BANKING
ASSOCIATION .....*Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ARKANSAS LEGISLATIVE DIGEST, INC.

QUESTION PRESENTED FOR REVIEW

WHETHER DEBT CANCELLATION AGREEMENTS AS AUTHORIZED BY THE COMPTROLLER OF THE CURRENCY ARE WITHIN THE INCIDENTAL POWERS OF 12 U.S.C. §24 (SEVENTH) AND GOVERNED BY THE NATIONAL BANK ACT AND THE RULES AND REGULATIONS THEREOF, OR ARE DEBT CANCELLATION AGREEMENTS THE BUSINESS OF INSURANCE AND, IF DETERMINED TO BE THE LATTER, WHETHER THE NATIONAL BANK ACT SUPERCEDES AND PREEMPTS REGULATION BY THE ARKANSAS INSURANCE DEPARTMENT AND THE RULES THEREOF.

TABLE OF CONTENTS

Page

QUESTION FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT (Reasons for Denying Writ)

I. Considerations in Granting a Writ of Certiorari 5

II. No Error Regarding the "Incidental Powers" Question 8

III. No New Revision of the McCarren-Ferguson Act and No New Authority for the Comptroller 13

CONCLUSION 20

CERTIFICATE OF SERVICE 21

APPENDIX: Opinion of the Court of Appeals for the Eighth Circuit ..... A-1—A-11

TABLE OF AUTHORITIES

Page

CASES:

American Ins. Assn. vs. Clarke,
865 F.2d 278 (D.C. Cir. 1988) 8

American Society of Travel Agents, Inc. vs. Bank of America National Trust and Savings Association, 385 F. Supp. 1084 (D. Cal. 1974) 10

Arnold Tours, Inc. vs. Camp,
472 F.2d 427 (1st Cir. 1972) 8, 10, 11

Attorney Gen. ex rel. Monk vs. C. E. Osgood Company, 144 N.E. 371 (Mass. 1924) 18

Colorado National Bank vs. Bedford,
310 U.S. 41 (1939) 8

First National Bank vs. Missouri, 263 U.S. 640 ..... 11, 15

Group Life and Health Insurance Company vs. Royal Drug Company, 440 U.S. 205 (1979) 15

M & M Leasing vs. Seattle First National Bank, 563 F.2d 1377 (9th Cir. 1977), *cert. denied*,
436 U.S. 956 (1978) 8, 9, 19

S.E.C. vs. Variable Annuity Life Insurance Company, 359 U.S. 65 (1959) 18

Securities Indus. Assn. vs. Clarke, 885 F.2d 1034 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1113 (1990) .. 8

State vs. Beardsley, 88 Minn. 20, 92 N.W. 472 (1902) .. 18

Union Labor Life Insurance Company vs. Pireno,
458 U.S. 119 (1982) 15, 17

Page

CASES:

United Sec. Life and Trust Company vs. Bond, 16 App. D.C. 579 (1902) 18

Ware vs. Heth, 237 S.W.2d 362 (Tex. Civ. App. 1951) 17

STATUTES:

12 U.S.C. §1 1

12 U.S.C. §24 (Seventh) 15

12 U.S.C. §93(a) 1

REGULATIONS:

12 C.F.R. §7.7495 ..... 1, 12

Interpretive Letter No. 99 12

Interpretive Letter No. 277 12

OTHER AUTHORITIES:

U.S. Supreme Court, Rule 10 6

Letter dated January 7th, 1988, from Senior Deputy Comptroller, J. Michael Shepherd 12

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ARKANSAS, A NATIONAL BANKING
ASSOCIATION ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves the issue of whether a national bank, such as First National Bank of Eastern Arkansas (the Bank), can enter into debt cancellation agreements with its borrowers. National banks are regulated by the National Bank Act, 12 U.S.C. §1, et seq., and the Comptroller of the Currency is the official charged with the administration of the National Bank Act. 12 U.S.C. §93(a). In 1964, the Comptroller of the Currency issued a regulation designated 12 C.F.R. §7.7495 which authorized national banks to enter into debt can-

cellation agreements with its borrowers. The Bank began entering into debt cancellation agreements with some of its customers in 1987. The Bank initially charged the same fee as credit life insurance companies, with the intent to adjust the fee according to its experience. The Bank later reduced the fee by approximately 10%. A few weeks after it began issuing debt cancellation agreements, the bank was advised by the Arkansas Department of Insurance to cease issuing debt cancellation agreements. The bank filed this action seeking to determine whether its actions in regard to debt cancellation agreements are considered to be the business of banking, thereby governed by the National Bank Act and the rules and regulations thereof, or the business of insurance and, if determined to be the latter, whether the National Bank Act supercedes and preempts regulation by the Arkansas Insurance Department under the insurance laws of the State of Arkansas and the rules and regulations issued pursuant thereto. The District Court found that the Bank's debt cancellation agreements are within the incidental powers necessary to carry on the business of banking and do not constitute the business of insurance. The Eighth Circuit Court of Appeals found that the Comptroller's authorization of debt cancellation agreements was reasonable and within the incidental powers granted by the National Bank Act and that debt cancellation agreements do not constitute the "business of insurance" under the McCarren-Ferguson Act.

SUMMARY OF ARGUMENT

A Writ of Certiorari is not a matter of right and will only be issued for special and important reasons. There are no special or important reasons for this Honorable Court to issue a Writ of Certiorari in this case. The question presented is one of first impression and does not conflict with any decision of this Court, any United States court of appeal, or any state court of last resort. The Eighth Circuit did not commit any errors in its analysis of this matter and followed the applicable decisions of this Honorable Court.

The Eighth Circuit did not commit an error in its analysis of whether a debt cancellation agreement was an "incidental power" as defined by the National Bank Act by failing to adequately scrutinize the issue. A careful and proper analysis was undertaken and all the relevant cases were properly considered by the Eighth Circuit. Further, there was no improper deference to the Comptroller's opinion.

The question presented is a narrow one confined only to a determination of whether debt cancellation agreements are within the "incidental powers" granted by the National Bank Act and whether such agreements constitute the "business of insurance" so as to invoke the McCarren-Ferguson Act. The Eighth Circuit's decision will not open any floodgates to unregulated and uninhibited insurance underwriting activities by national banks as alleged by the Petitioners.

The Eighth Circuit panel's decision does not grant the Comptroller of the Currency any power over the McCarren-Ferguson Act and the Eighth Circuit did not find that because the activity was "incidental" to the business of banking that it cannot be within the ambit of the McCarren-Ferguson Act.

These were separate and distinct issues that were addressed by the Eighth Circuit panel separately. The Eighth Circuit panel first found that debt cancellation agreements were within the "incidental powers" granted by the National Bank Act. The Court then analyzed the issue of whether these agreements constituted the "business of insurance". The Eighth Circuit found debt cancellation agreements do not constitute the "business of insurance" under the McCarren-Ferguson Act. As to both issues, the Eighth Circuit underwent a proper legal analysis.

The panel's decision that debt cancellation agreements do not constitute the "business of insurance" did not cast any doubt on the continued viability of the McCarren-Ferguson Act and it does not give the Comptroller any additional powers.

No errors were committed by the Eighth Circuit in analyzing the issues in this case. Further, the decision does not conflict with any other decision of this Honorable Court. There is no important or special reason for this Honorable Court to issue a Writ of Certiorari in this case. Therefore, the Petitioners' request for a Writ of Certiorari should be denied.

ARGUMENT

I.

CONSIDERATIONS IN GRANTING A WRIT OF CERTIORARI

The Petitioners are asking this Court to grant a Writ of Certiorari in this case because they feel that the decision of the Eighth Circuit panel has "rewritten the McCarren-Ferguson Act and expanded the National Bank Act powers of the Comptroller and of national banks". They further claim that this was accomplished by way of a legal analysis which conflicts with prior decisions of this Honorable Court. This simply is not the case.

This case presents an issue that has never been addressed by this Court, a United States court of appeals, or a state court of last resort. It is a question of first impression and the Eighth Circuit analyzed and followed the relevant cases decided by this Court in determining that debt cancellation contracts are an "incidental power" necessary to carry on the "business of banking" as defined by the National Bank Act and that such agreements do not constitute the "business of insurance" as that term is defined in the McCarren-Ferguson Act. There is no conflict between the Eighth Circuit's decision in this case and prior decisions of this Honorable Court.

The Eighth Circuit's decision did not rewrite the McCarren-Ferguson Act nor did it expand the National Bank Act. The decision is a narrow one in which the Court simply determined that the Comptroller's authorization of debt cancellation contracts is reasonable and within the "incidental powers" granted by the National Bank Act and that debt cancellation agreements do not constitute the "business of

insurance" as defined by the McCarren-Ferguson Act. The Eighth Circuit simply followed the applicable decisions and interpreted the language of two (2) Federal statutes. This has been done numerous times by the United States courts of appeal and is one of the reasons we have United States courts of appeal.

A Writ of Certiorari is not a matter of right, but of judicial discretion. It will only be granted for special and important reasons. U. S. Supreme Court, Rule 10. Some reasons considered are:

> (1) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.
>
> (2) When a state court of last resort has decided a federal question in a way that conflicts with the decisions of another state court of last resort or of a United States court of appeals.
>
> (3) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Supreme Court Rule 10.

As stated earlier, this case presents a question of first

impression of this Honorable Court, as well as for the Eighth Circuit Court of Appeals. For that matter, no other United States court of appeals or a state court of last resort has addressed the question presented by this case.

Turning to the first consideration, the Eighth Circuit's decision in this case did not conflict with the decision of another United States court of appeals on the same matter nor did the Eighth Circuit's decision decide a federal question in a way so as to conflict with a state court of last resort. Further, there is nothing in the record that indicates that the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Clearly, the first consideration is not applicable.

The second consideration has no application because this is a request for a Writ of Certiorari from a decision of a United States court of appeals and not from a state court of last resort.

As to the third consideration, the question presented in this case is not one that should be settled by this Honorable Court. The Eighth Circuit was simply called upon to interpret the language of two (2) federal statutes. The Eighth Circuit analyzed and followed the applicable decisions of this Honorable Court, as well as analyzing the decisions in other United States courts of appeal. The Eighth Circuit's decision in this case does not in any way conflict with the applicable decisions of this Honorable Court. In fact, the Eighth Circuit cited several decisions of this Honorable Court as support for its decision.

For the foregoing reasons, the Petitioners' request for a Writ of Certiorari from this Honorable Court should be denied.

II.

NO ERROR REGARDING THE "INCIDENTAL POWERS" QUESTION

The Eighth Circuit panel, as well as the trial court in the first instance, did not ignore or fail to adequately scrutinize the issue of whether a national bank's issuance of debt cancellation agreements meet the test of "incidental powers" as defined by the National Bank Act. The panel analyzed the issue by addressing the question of whether the activity is closely related to an express power and is useful in carrying out the business of banking. This is similar to the test that is set out in *Arnold Tours, Inc. vs. Camp*, 472 F.2d 427 (1st Cir. 1972), which is the test that most courts have adopted in making the determination of whether a national bank's activity is authorized as an incidental power necessary to carry on the business of banking. The panel then cited five (5) cases, along with their holdings, as support for its decision that debt cancellation agreements are incidental to an express power of national banks. *Colorado National Bank vs. Bedford*, 310 U.S. 41 (1939); *Securities Indus. Assn. vs. Clarke*, 885 F.2d 1034 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1113 (1990); *American Ins. Assn. vs. Clarke*, 865 F.2d 278 (D.C. Cir. 1988); *M & M Leasing vs. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Arnold Tours, Inc. vs. Camp*, 472 F.2d 427 (1st Cir. 1972). See Appendix, Page 5. Based upon these cases, the panel found that the debt cancellation agreements in issue in this case are directly related to First National Bank of Eastern Arkansas' expressly authorized lending power; are a convenient method of extinguishing debt in case of death; and enable First National Bank of Eastern Arkansas to avoid the time, expense and risk associated with attempting to collect the balance of the loan

from the borrower's estate. See Appendix, Page 6.

There really is no need for any further analysis. It has already been determined that banks can act as an agent selling credit life insurance in connection with its loans as an incidental power. Debt cancellation agreements were being offered by the bank to its customers in connection with a loan as well. The service to the customer is the same — i.e., the estate is not responsible for the debt. Therefore, the debt cancellation agreement is a service being offered that is "incidental" to the lending of money. There was no error committed by the Eighth Circuit panel's analysis that debt cancellation agreements are within the "incidental powers" of the National Bank Act.

The Petitioners then listed several "factors" that have been mentioned in some of the cases dealing with the issue of whether an activity was within the "incidental powers" of national banks. These were only some of the considerations that the various cases discussed and were merely arguments offered by the parties in those cases in an attempt to establish that the activity at issue was closely related to an express power and was useful in carrying out the "business of banking". Let's take a brief look at the factors:

> (1) Whether the activity involves a traditional function of the banks versus a new and unfamiliar venture. See *M & M Leasing Corp. vs. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) (Certain leasing activities by national banks were considered "incidental" because leasing was incidental to the lending of money on personal security. The Court recognized that the powers of national banks must be construed to permit new ways

of conducting the business of banking.)

(2) Whether the new activity sought to be conducted is one which is already subject to regulation by non-banking agencies. This activity has always been regulated by the Comptroller. It is not an activity that has been conducted in another area, such as leasing. It is simply a new activity carried on by national banks as a part of their business of banking.

(3) Whether the new activity would expose national banks to risks of operation which Congress did not intend the banks to assume. See *American Society of Travel Agents, Inc. vs. Bank of America National Trust and Savings Association,* 385 F. Supp. 1084 (D. Cal. 1974). (The Court struck down a national bank being able to operate a full scale travel club that was offered to the public at large because Congress wanted to avoid the risk that the reputation of a bank would be tied to the successful operation of a business venture, subject to the vicissitudes of the marketplace, which is not incidental to the business of banking. The bank would have to put money into a failing business to protect the reputation of the bank and the public's confidence in the bank.)

(4) Whether the Comptroller has been consistent and logical in his positions with regard to the "incidental" nature of the proposed activity. See *Arnold Tours, Inc. vs. Camp,* 472 F.2d 427 (1st Cir. 1972). (The Court found that since the Comptroller had not been consistent in his interpretation of the statute, that his regulation finally authorizing national banks to engage in the travel agency business should not be given a dispositive deference.)

(5) Whether national banks have previously sought to avail themselves of an activity that is "convenient and useful" to the "business of banking". See *Arnold Tours, Inc. vs. Camp*, 472 F.2d 427 (1st Cir. 1972). (The bank tried to argue it was convenient and useful to operate a travel agency because many banks operated a travel agency business. The Court did not find this argument persuasive because not many banks did, in fact, operate a travel agency business.)

These cases were considered by the Eighth Circuit panel.

The Eighth Circuit did not err in its analysis of whether a debt cancellation agreement meets the test for "incidental powers" as defined by the National Bank Act.

Finally, the Court did note that this Court has made clear that the Comptroller's interpretation of the National Bank Act must be given great weight. *First National Bank vs. Missouri*, 263 U.S. 640 (1924). However, the panel did not "defer uncritically to the Comptroller's own self-serving pronouncements on the subject" in lieu of a detailed and careful analysis of the issue. After determining that debt cancellation agreements are directly connected to the Bank's lending activities, the panel deemed the Comptroller's authorization of this activity as reasonable and within the incidental powers granted by the National Bank Act. See Appendix, Page 6. No new standard was created whereby National Banks could conduct "virtually any insurance activity and, indeed, any business, so long as the Comptroller approves, and the activity has any remote connection to the extension of loans", as argued by the Petitioners. The Court applied the test set out in *Arnold Tours* in finding this activity to be incidental to the "business of banking".

Also, contrary to that stated in the Petitioners' Brief, the Comptroller has always approved of national banks issuing debt cancellation agreements since 1964. See 12 C.F.R. §7.7495; Public statement of May 18th, 1964, by Comptroller Saxton (all activities of a national bank, including its activities in executing debt cancellation contracts, are performed under its corporate powers and are governed by federal legislation and regulations pertaining to banking activities of national banks); Comptroller's Interpretive Letter No. 99, June 8th, 1979 (the Comptroller asked why national banks don't simply perform underwriting in-house through writing "debt cancellation contracts" as allowed by 12 C.F.R. §7.7495); Interpretive Letter No. 277, December 21st, 1983 (Comptroller determined that underwriting of credit life insurance was incidental to the business of banking); Letter of January 7th, 1988, from Senior Deputy Comptroller J. Michael Shepherd (Debt cancellation agreements are a form of self-protection and not the business of insurance). Clearly the Comptroller has always been consistent in his position that debt cancellation agreements are incidental to the business of banking.

The Eighth Circuit did not commit an error in its analysis of whether a debt cancellation agreement was an "incidental power" as defined by the National Bank Act by failing to analyze the legal issue. A careful and proper analysis was undertaken by the Eighth Circuit. Further, there was no improper deference to the Comptroller's opinion. It was only a consideration given by the Court and no error was committed in regard thereto.

III.

NO NEW REVISION OF THE McCARREN-FERGUSON ACT AND NO NEW AUTHORITY FOR THE COMPTROLLER

Nowhere in the pleadings, briefs or other matters before the District Court, the Eighth Circuit Court of Appeals, or this Honorable Court is it admitted, and the Respondents take a strong position against such a contention, that debt cancellation agreements are an insurance product. In fact, that is one of the issues in this case — that is, whether debt cancellation agreements constitute the "business of insurance". The panel made the determination that debt cancellation agreements were not the "business of insurance". The panel further found that the Comptroller's authorization of such agreements as an "incidental power" under the National Bank Act was reasonable. No applicable precedent was ignored and no new standard was created for marking the boundaries of state regulation of insurance matters under the McCarren-Ferguson Act. In reaching its decision, the panel simply applied the relevant decisions of this Court, as well as decisions of various United States courts of appeal.

The panel found that debt cancellation agreements do not constitute the "business of insurance". The panel cited the following two (2) reasons for its holding that the debt cancellation agreements offered by the Bank did not constitute the "business of insurance" under the McCarren-Ferguson Act:

(1) The McCarren-Ferguson Act was not directed at the activities of national banks;

(2) Debt cancellation contracts issued by banks in

connection with loans differ significantly from traditional insurance contracts.

See Appendix, Pages 7 and 9.

The Petitioners do not seem to understand the holding in this case. The Petitioners repeatedly argue that the Eighth Circuit panel applied a new standard — that First National Bank of Eastern Arkansas' "credit life insurance underwriting" is not the "business of insurance" because it is conducted by a national bank. This holding cannot be found anywhere in the Eighth Circuit's opinion in this case. The Petitioners completely ignore the fact that the Eighth Circuit panel was called upon to determine whether debt cancellation agreements constitute the "business of insurance" and that the Eighth Circuit found debt cancellation agreements do not constitute the "business of insurance". On the premises of this misinterpretation of the panel's decision, the Petitioners then allege that the Eighth Circuit committed two (2) errors:

> (1) The panel's approach to the issue concedes to the Comptroller of the Currency full power of interpretation over the McCarren-Ferguson Act because under the panel's decision, if the Comptroller first determines that an activity is within a national bank's "incidental powers" then there is no need, indeed, no possibility, of going on to consider whether this activity is within the "business of insurance" and, thus, subject to regulation by the states; and,
>
> (2) The panel's approach discards the 3-part test for the "business of insurance" under McCarren-Ferguson.

First of all, the panel did not concede to the Comptroller

of the Currency full power of interpretation over the McCarren-Ferguson Act. The Comptroller simply interpreted that "incidental powers" under 12 U.S.C. §24 (Seventh) of the National Bank Act included debt cancellation agreements. The Comptroller has no authority to determine and did not determine what is the "business of insurance" under the McCarren-Ferguson Act. This decision does not grant him any such power, either expressly or implicitly. This Honorable Court has already recognized that great weight should be given to the Comptroller's interpretations. *First National Bank vs. Missouri,* 263 U.S. 640 (1924). The Court did not simply accept his determination, but underwent its own analysis in making its decision. Nothing in the Court's decision indicates that the Comptroller has any authority to interpret the McCarren-Ferguson Act or that if an activity is found to be within an "incidental power" of the national bank, that there is no possibility that that activity could also constitute the "business of insurance".

Secondly, the first "error" is based upon a misinterpretation of the holding. The Eighth Circuit panel determined (1) debt cancellation agreements were not the "business of insurance" and (2) the Comptroller's authorization of the debt cancellation agreement was reasonable. These were two (2) different issues that needed to be resolved. The Court analyzed both issues separately and made independent findings as to each.

As to the second "error", the panel did analyze and follow *Union Labor Life Insurance Company vs. Pireno,* 458 U.S. 119 (1982), and *Group Life and Health Insurance Company vs. Royal Drug Company,* 440 U.S. 205 (1979), as well as other decisions of this Honorable Court. In *Pireno* and *Royal Drug,* the Court identified three (3) criteria relevant in determining

whether a particular practice is part of the "business of insurance":

> (1) Whether the practice has the effect of transferring or spreading a policyholder's risk;
>
> (2) Whether the practice is an integral part of the policy relationship between the insurer and the insured;
>
> (3) Whether the practice is limited to entities within the insurance industry.

The Court went on to find that none of these criteria is determinative in itself.

Turning to the first criterion, there is no spreading of risk among policyholders. The risk occurs when the bank loans the money to its customer. The debt cancellation agreement is offered by the bank as a means of handling the borrower's debt should he die before he can repay the loan. This enables the bank to avoid the time, expense, and risk associated with attempting to collect the balance of the loan from the borrower's estate.

In addition, there is no risk to the borrower because the debt will be extinguished, whether or not the bank is solvent. The Court found that debt cancellation agreements differ significantly from the traditional insurance contracts in that debt cancellation agreements do not require the bank to make a payment to the borrower's estate and, therefore, the prevention of insolvency is not of concern with the debt cancellation agreement. It is the primary concern with credit life insurance. The insurance company must be solvent to pay off the debt to the bank if its policyholder dies before the debt has been repaid. The bank does not have to make such a

payment, but simply extinguishes the debt. This is a very important difference between these two (2) products.

Looking at the second criterion, it is clear that debt cancellation agreements are not an integral part of a policy relationship between insurer and insured and, therefore, that criteria did not need to be discussed at all. The debt cancellation agreements were a separate contractual arrangement between the bank and its customers in regard to the distribution of services (i.e., lending of money) other than insurance which resulted in a cost savings to its customers. The debt cancellation agreements were a separate arrangement between the bank and its borrowers, neither of which are engaged in the business of insurance.

In looking at this case, the panel focused its attention mostly on the third criterion. It is obvious that the debt cancellation agreements are not limited to entities within the insurance industry. This case involves an activity carried on by a national bank and its customers. No entity within the insurance industry is involved at all. This Court has been reluctant to extend the definition of the "business of insurance" to include parties wholly outside the insurance industry. *Union Labor Life Insurance Company vs. Pireno,* 458 U.S. 119 (1982). The Court in *Pireno* further noted that the McCarren-Ferguson Act was intended primarily to protect "intra-industry cooperation" in the underwriting of risk.

The panel properly applied federal law in reaching its decision and no new test was established. The panel was not bound by the decisions of a few State Appellate Courts which found debt cancellation contracts to fall within their State's definitions of "insurance". See *Ware vs. Heth,* 237 S.W.2d 362

(Tex. Civ. App. 1951); *Attorney Gen. ex rel. Monk vs. C. E. Osgood Company*, 144 N.E. 371 (Mass. 1924); *State vs. Beardsley*, 88 Minn. 20, 92 N.W. 472 (1902); See also *United Sec. Life and Trust Company vs. Bond*, 16 App. D.C. 579 (1902). State law defining insurance is not controlling on the issue of whether an activity falls within the "business of insurance" as defined in the McCarren-Ferguson Act. *S.E.C. vs. Variable Annuity Life Insurance Company*, 359 U.S. 65 (1959). See Appendix, Page 10.

The Petitioners next allege an "error" in the Court's use of the language "investment risk" to the bank because "it does not focus upon how it effects the relationship between the insurer and the insured, but rather the investment risk to the bank". The Petitioners seem to have missed the point the Court was trying to make. The Court was not concerned with the effect these debt cancellation agreements might have on the solvency of the bank; that is for the Comptroller to regulate. The Court was focusing on the fact that there is no risk whatsoever to the customer with a debt cancellation agreement because the bank is simply extinguishing the debt as opposed to guaranteeing that the bank will pay a third party the balance of the debt. The borrower is not dependent upon the bank to remain solvent with a debt cancellation agreement; however, the borrower is at risk insofar as credit life insurance if the insurance company becomes insolvent. That is the primary and traditional concern behind the state insurance regulations and it is not a concern with a debt cancellation agreement.

Finally, one of a national bank's express powers is to loan money. Before loaning money to a borrower, the bank looks at the creditworthiness of the applicant and usually the value of the collateral offered to secure the loan. The Eighth Circuit

panel's decision does not offer any prospect for a wholesale usurpation of the state regulation of insurance by allowing banks to underwite automobile physical damage insurance through an agreement to cancel the debt if the automobile is destroyed in an accident, or fire insurance in the event of the burning of a mortgaged home, as stated by the Petitioners. The bank would still look to the borrower for the payment of his debt if one of these events happened and the destruction of the collateral is only secondary to the loan. Debt cancellation agreements are only being offered so as to enable the bank to lend money to certain borrowers and avoid the time, expense and risk associated with attempting to collect the balance of the loan from a borrower's estate.

In addition, *M & M Leasing Corp. vs. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1977), *cert, denied*, 436 U.S. 956 (1978), recognized that a national bank cannot offer operational services such as repairs, maintenance, insurance coverage, license renewals, etc., because such services are not those of a national bank. In *M & M Leasing*, the Court found that the bank could engage in certain leasing activities.

None of the alleged errors cited by the Petitioners were committed by the Eighth Circuit Court of Appeals and, therefore, this Court should deny the Petitioners' request that a Writ of Certiorari be issued in this case.

CONCLUSION

For all the foregoing reasons, the Petitioners' request for an issuance of a Writ of Certiorari to the Court of Appeals for the Eighth Circuit, so that this Honorable Court may review the Eighth Circuit panel's decision, should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Philip Hicky, II, hereby certify that I have served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari in accordance with Supreme Court Rules 29.3 and 29.5(b) by U.S. Mail, with sufficient pre-paid postage to Mr. Allan W. Horne, Mr. Chet Roberts and Mr. Lee Douglass, Davidson, Horne & Hollingsworth, 501 First Federal Savings Plaza, P. O. Box 3363, Little Rock, Arkansas 72203, attorneys for the Petitioners, this 19th day of October, 1990.

/s/ Philip Hicky, II
Butler, Hicky & Long

APPENDIX

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 89-1260

First National Bank of Eastern Arkansas, A National Banking Association,	★	
Appellee,	★	
v.	★	
Ron Taylor,* Commissioner of the Insurance Department for the State of Arkansas	★	Appeal from the United States District Court for the Eastern District of Arkansas.
Appellant,	★	
Arkansas Credit Insurance Association (Intervenor Below), Appellant.	★	

Submitted: January 18, 1990

Filed: June 25, 1990

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

LAY, Chief Judge.

In July, 1987, First National Bank of Eastern Arkansas

*Ron Taylor succeeded Robert M. Eubanks, III, as Commissioner of the Arkansas Insurance Department before the notice of appeal was filed. Thus, he is substituted as an appellant. *See* Fed. R. Civ. P. 25(d)(1).

(FNB) began offering debt cancellation contracts as additional-cost options to customers borrowing $10,000 or less. These contracts obligated FNB to cancel the unpaid loan balance remaining at the borrower's death, regardless of the cause of death. FNB offered the debt cancellation contracts at rates that did not vary with a borrower's age or medical condition. A regulation promulgated by the United States Comptroller of Currency (Comptroller) authorizes national banks to enter into debt cancellation contracts. *See* 12 C.F.R. § 7.7495 (1990).[1]

In September, 1987, the Arkansas Insurance Department notified FNB that debt cancellation contracts were the equivalent of credit life insurance policies, and thus subject to state insurance laws. The Department requested that FNB stop offering the contracts.[2] FNB complied, but then brought a suit in federal district court seeking a declaration that the Department's action was preempted by the National Bank Act, 12 U.S.C. §§ 21-216d (1988). Jurisdiction was invoked pursuant to 28

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[1]12 C.F.R. § 7.7495 provides.

> A national bank may provide for losses arising from cancellation of outstanding loans upon the death of borrowers. The imposition of an additional charge and the establishment of necessary reserves in order to enable the bank to enter into such debt cancellation contracts are a lawful exercise of the powers of a national bank and necessary to the business of banking.

[2]The Department indicated in its letter to FNB that the bank's failure to stop offering debt cancellation contracts would result in enforcement action by the Commissioner. Under Ark. Code of 1987 Ann. § 23-65-105 (Supp. 1989), the Commissioner has authority to issue a cease and desist order against any person who engages in the business of insurance without a license.

U.S.C. §§ 1331 and 2201.[3] The district court[4] held that the National Bank Act protected FNB's power to enter into debt cancellation contracts, and that the contracts did not constitute the "business of insurance" under section 2 of the McCarran-Ferguson Act, 15 U.S.C. § 1012 (1988). The Commissioner of the Arkansas Insurance Department (Commissioner) appeals.[5] We affirm the district court.

I.

Our inquiry in this case is limited to the question whether the Arkansas Insurance Commissioner may prohibit FNB from

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[3]We raised a question about jurisdiction on our own motion after argument. In *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 248 (1952), the Court suggested that federal-question jurisdiction may be lacking when a declaratory complaint sets forth a claim of federal right that is in the nature of a defense to a threatened state court action. Based on that dicta, and the "well-pleaded complaint" rule, this court in *Home Federal Savs. & Loan Ass'n v. Insurance Dep't of Iowa*, 571 F.2d 423 (8th Cir. 1978) and in *Lawrence County v. South Dakota*, 668 F.2d 27 (8th Cir. 1982), rejected federal jurisdiction because the preemption claim was in the nature of a defense to a state action. However, the Supreme Court has since made clear that a party may apply directly to federal court for relief based on an affirmative claim of preemption. *See Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 259 n.6 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). Jurisdiction is not defeated simply because a plaintiff requests declaratory relief rather than an injunction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); 13B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3566, at 99 (1984). Thus, we have jurisdiction to review the merits of this case.

[4]The Honorable George Howard Jr., United States District Judge for the Eastern District of Arkansas.

[5]The Arkansas Credit Insurance Association intervened below, and joins the Commissioner in this appeal.

entering into debt cancellation contracts.[6] The Commissioner initially urges that such a prohibition does not conflict with federal law because the National Bank Act does not grant national banks the power to offer debt cancellation contracts. The Commissioner argues that in authorizing the contracts, the Comptroller has exceeded his authority. We disagree.

In addition to enumerating specific powers, including the lending of money, the National Bank Act grants national banks the power to exercise "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). The Comptroller, through 12 C.F.R. § 7.7495, has interpreted "incidental powers" to include the offering of debt cancellation contracts, and the Supreme Court has made clear that the Comptroller's interpretation of the National Bank Act must be given "great weight":

> "It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by

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[6]Because the Commissioner's request that FNB stop offering debt cancellation contracts was grounded on FNB's failure to obtain a state license, the parties dispute whether this case should be regarded as one of prohibition or regulation. However, Arkansas law requires licensees to submit to extensive state regulation, including maintenance of specific capital and surplus levels, payment of licensing fees, financial information disclosure, and inspection by the Commissioner. Compliance with these requirements would pervert FNB's status as a federal instrumentality. Moreover, 12 U.S.C. § 484 (1988) prohibits states from exercising "visitorial powers" over national banks. For these reasons, we regard the Commissioner's request as a prohibition on FNB's issuance of debt cancellation contracts.

The Comptroller, in an amicus curiae brief, concedes that there may be particular state insurance regulations (e.g., those limiting premium rates) which apply to debt cancellation contracts and which do not conflict with national banking powers. We agree with the Comptroller's argument that these issues are more properly addressed on a case-by-case basis.

> the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws. See *First National Bank v. Missouri*, 263 U.S. 640, 658 [1924]."

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 403-04 (1987) [quoting *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-27 (1971)]. The Comptroller's determination as to what activities are authorized under the National Bank Act should be sustained if reasonable. *See Clarke*, 479 U.S. at 406, 409.

The "incidental powers" of national banks are not limited to activities that are deemed essential to the exercise of express powers. Rather, courts have analyzed the issue by asking whether the activity is closely related to an express power and is useful in carrying out the business of banking. For example, the Supreme Court, in *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41 (1939), held that a national bank was authorized to operate a safe-deposit business, reasoning that this activity was incidental to the bank's express power to accept special deposits. *Id.* at 49-50. *See also Securities Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1049 (2d Cir. 1989) (sale of mortgage "pass-through" certificates authorized by National Bank Act because "convenient and useful" in connection with bank's sale of mortgage loans), *cert. denied*, 110 S. Ct. 1113 (1990); *American Ins. Ass'n v. Clarke*, 865 F.2d 278, 281-82 (D.C. Cir. 1988) (sale of municipal bond insurance by national bank subsidiary falls within incidental powers because it is essentially a credit product); *M & M Leasing v. Seattle First Nat'l Bank*, 563 F.2d 1377, 1382 (9th Cir. 1977) (National Bank Act authorizes personal property leasing that is incidental to national bank's express power to "loan money on personal property"), *cert. denied*, 436 U.S. 956 (1978); *cf. Arnold*

Tours, Inc. v. Camp, 472 F.2d 427, 433-34 (1st Cir. 1972) (operation of full-scale travel agency not within incidental powers because not convenient or useful in connection with any express power).

As the district court found, the debt cancellation contracts at issue in this case are directly related to FNB's expressly-authorized lending power. The contracts are sold only in connection with loans made by FNB, and involve only FNB and its borrowing customers. The contracts provide borrowers with a convenient method of extinguishing debt in case of death, and enable FNB to avoid the time, expense, and risk associated with attempting to collect the balance of the loan from a borrower's estate. Because we agree with the district court that the debt cancellation contracts are directly connected to FNB's lending activities, we deem the Comptroller's authorization of this activity as reasonable and within the incidental powers granted by the National Bank Act.

II.

Having found that the National Bank Act authorizes national banks to offer debt cancellation contracts as "incidental" to the business of banking, we find in favor of FNB under the principle of federal preemption. Because national banks are considered federal instrumentalities, *e.g.*, *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 375 (1954), states may neither prohibit nor unduly restrict their activities. *See id.* at 378-79; *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248 (1944). Thus, the National Bank Act preempts the Commissioner's authority to prohibit FNB from offering debt cancellation contracts.

The Commissioner argues, however, that section 2 of the McCarran-Ferguson Act limits the preemptive power of the

National Bank Act in this case because it forbids courts to construe the National Bank Act in a manner that impairs a state's authority to regulate the "business of insurance." 15 U.S.C. § 1012(b).[7] The Commissioner urges that because debt cancellation contracts have the same effect as credit life insurance contracts, they are subject to the exclusive regulatory authority of the state under the McCarran-Ferguson Act. We reject this argument. We hold that because the debt cancellation contracts offered by FNB fall within the incidental powers granted by the National Bank Act, they do not constitute the "business of insurance" under the McCarran-Ferguson Act.

We reach this holding for two reasons. The primary reason is that the McCarran-Ferguson Act was not directed at the activities of national banks. The McCarran-Ferguson Act was passed by Congress in response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that the insurance industry was subject to regulation by Congress under the Commerce Clause, and that insurance company activities were subject to federal antitrust laws. *Id.* at 553. The McCarran-Ferguson Act was designed to preserve traditional state regulation and taxation of insurance companies, and to provide insurance companies with a partial exemption from federal antitrust laws. *Group Life & Health Ins.*

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[7]The relevant portion of section 2 of the McCarran-Ferguson Act reads as follows:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance • • • .

15 U.S.C. § 1012.

Co. v. Royal Drug Co., 440 U.S. 205, 217-18 (1979); *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). In holding that certain pharmacy contracts involving health-care organizations were not the "business of insurance," the Court in *Group Life* expressed doubt as to whether the McCarran-Ferguson Act applied to entities commonly thought to be outside the insurance industry:

> There is not the slightest suggestion in the legislative history that Congress in any way contemplated that arrangements such as the Pharmacy Agreements in this case, which involve the mass purchase of goods and services from entities outside the insurance industry, are the "business of insurance."
>
> • • •
>
> At the time of the enactment of the McCarran-Ferguson Act, corporations organized for the purpose of providing their members with medical services and hospitalization were not considered to be engaged in the insurance business at all, and thus were not subject to state insurance laws. • • • Since the legislative history makes clear that Congress certainly did not intend the definition of the "business of insurance" to be *broader* than its commonly understood meaning, the contemporary perception that health-care organizations were not engaged in providing insurance is highly significant in ascertaining congressional intent.

440 U.S. at 224-27 (emphasis in original). *See also Union Labor Life*, 458 U.S. at 133 ("§ 2(b) [of the McCarran-Ferguson Act] was intended primarily to protect '*intra*-industry cooperation' in the underwriting of risks") (quoting *Group Life*, 440 U.S. at 221) (emphasis in original); *United Servs. Auto. Ass'n v. Muir*, 792

F.2d 356, 364 (3d Cir. 1986) (Pennsylvania statute prohibiting mergers between banks and insurance companies not protected by McCarran-Ferguson Act because, among other reasons, banks are not entities within the insurance industry), *cert. denied*, 479 U.S. 1031 (1987).

The McCarran-Ferguson Act was not intended to give states power to regulate beyond that which they had been thought to possess prior to the *South-Eastern Underwriters* decision. As the Court in *SEC v. National Sec., Inc.*, 393 U.S. 453 (1969) said,

> The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation. As the House Report makes clear, "[i]t [was] not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case." H.R. Rep. No. 143, 79th Cong., 1st Sess., 3 (1945).

Id. at 459. *See also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 n.8 (1985). Yet, well before the *South-Eastern Underwriters* decision, regulation of national banks was within the exclusive domain of the federal government. *E.g., First Nat'l Bank v. California*, 262 U.S. 366, 369 (1923). This strongly indicates that Congress did not intend the "business of insurance" to encompass lawful activities of national banks.

Our second reason for holding that the debt cancellation contracts offered by FNB are not the "business of insurance" is

that debt cancellation contracts issued by banks in connection with loans differ significantly from traditional insurance contracts. Although debt cancellation contracts may, as the Commissioner argues, transfer some risk from the borrower to the bank,[8] the contracts do not require the bank to take an investment risk or to make payment to the borrower's estate. The debt is simply extinguished when the borrower dies. Thus, the primary and traditional concern behind state insurance regulation — the prevention of insolvency — is not of concern to a borrower who opts for a debt cancellation contract. As Justice Brennan said in his concurring opinion in *Variable Annuity Life*, 359 U.S. at 90-91, "The prevention of insolvency and the maintenance of 'sound' financial condition in terms of fixed-dollar obligations is precisely what traditional state regulation [of insurance] is aimed at." The fact that debt cancellation contracts issued by national banks in connection with loans do not implicate this central concern of insurance regulation, at least as it relates to the ability of the banks to fulfill their obligations under the contracts, adds further support to our

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[8]We acknowledge that in addition to the Commissioner a few state appellate courts have found debt cancellation contracts to fall within their states' definitions of "insurance." *See Ware v. Heath*, 237 S.W.2d 362 (Tex. Civ. App. 1951); *Attorney Gen. ex rel. Monk v. C. E. Osgood Co.*, 144 N.E. 371 (Mass. 1924); *State v. Beardsley*, 88 Minn. 20, 92 N.W. 472 (1902); *see also United Sec. Life & Trust Co. v. Bond*, 16 App. D.C. 579 (1902). However, state law defining insurance is not controlling on the issue of whether an activity falls within the "business of insurance" as that term is used in the McCarran-Ferguson Act. *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65, 69 (1959).

holding that debt cancellation contracts should not be considered the "business of insurance."[9]

III.

In conclusion, we hold that the National Bank Act precludes the Arkansas Commissioner of Insurance from prohibiting FNB, either by direct coercion or through a license requirement, from entering into debt cancellation contracts with its borrowers. The Comptroller has reasonably determined that these contracts are authorized by the National Bank Act, and we think that this determination must control. Therefore, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[9]The responsibility of ensuring the financial condition of the national banking system has long been committed to the Comptroller. In the case of debt cancellation contracts, the Comptroller has indicated that banks must use prudent banking judgment, which may include the establishment of reserves to cover losses resulting from early debt cancellation. *See* 12 C.F.R. § 7.7495; Letter from J. Michael Shepherd, Senior Deputy Comptroller for Corporate and Economic Programs, to W. D. Glover, FNB Chairman and President, (Jan. 7, 1988) (Trial Ex. 8). If a national bank is engaging in "unsafe or unsound" banking practices, the Comptroller, under 12 U.S.C. § 1818(b), may issue a cease and desist order.